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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 16, 1997

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

RE: CC Docket No. 97-146

Dear Mr. Caton:

Enclosed please find an original and 16 copies of "WorldCom's Reply Comments" plus a diskette copy of the above-referenced docket.

Sincerely,

Richard S. Whitt
Director, Federal Affairs

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Complete Detariffing for	)	CC Docket No. 97-146
Competitive Access Providers and	)	
Competitive Local Exchange Carriers	)	

REPLY COMMENTS OF WORLDCOM, INC.

WorldCom, Inc. ("WorldCom"), by its attorneys, hereby files its reply comments opposing the Commission's proposal to require competitive access providers ("CAPs") and competitive local exchange carriers ("CLECs") to not file federal tariffs for their services.

I. INTRODUCTION AND SUMMARY

WorldCom is a global telecommunications company that provides facilities-based and fully integrated local, long distance, international, and Internet services. WorldCom is the fourth largest facilities-based interexchange carrier ("IXC") in the United States. Following its merger with MFS Communications Company, Inc. on December 31, 1996, WorldCom is now also the largest facilities-based competitive local exchange carrier ("CLEC") in the United States. As a result, WorldCom is able to speak on telecommunications policy issues from the unified perspective of the local exchange, exchange access, and interexchange industries.

The Telecommunications Act of 1996 directs that "the Commission shall forbear from applying any regulation or any provision of this Act" to telecommunications carriers or services in one or more geographic markets,[1] provided that three determinations are made:

[1] 1996 Act, Section 10(a), codified at 47 U.S.C. Section 160(a) (1996).

(1) enforcement of the regulation or provision is not necessary to ensure that charges, practices, classifications or regulations are just and reasonable, and are not unjustly unreasonable or discriminatory;

(2) enforcement of the regulation or provision is not necessary to protect consumers; and

(3) forbearance from applying such regulation or provision is consistent with the public interest.[2]

The 1996 Act also specifies that "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."[3]

WorldCom strongly agrees with nearly every party filing initial comments in this proceeding that the Commission should not adopt its proposal to impose mandatory detariffing on competitive local exchange carriers and access providers. Not only does the Commission lack the statutory authority to forbid carriers from filing tariffs under Section 203 of the Communications Act, mandatory detariffing is not supported by proper application of the three-part statutory criteria. Thus, as is also the case with regard to interexchange carriers,[4] the Commission should not adopt its proposal requiring CLECs and CAPs to no longer file federal tariffs.

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[2] Id.

[3] 47 U.S.C. Section 160(b).

[4] See Comments of LDDS WorldCom, CC Docket No. 96-61, filed April 25, 1996; Reply Comments of LDDS WorldCom, CC Docket No. 96-61, filed May 24, 1996; Reply Comments of WorldCom, Inc., CC Docket No. 96-61, filed February 7, 1997.

II. WORLDCOM OPPOSES MANDATORY DETARIFFING AS CONTRARY TO THE TELECOMMUNICATIONS ACT OF 1996 AND SOUND PUBLIC POLICY

A. The FCC Lacks Statutory Authority To Impose Mandatory Detariffing

Commenters agree in near unison that the Communications Act of 1934, as amended by the Telecommunications Act of 1996, does not give the Commission the authority to prohibit carriers from filing tariffs.[5] Because Section 203 of the 1934 Act specifies that "every" carrier "shall" file tariffs for "all" charges, terms, and conditions of service,[6] the D.C. Circuit held in 1984 that Section 203 cannot be overturned simply by the adoption of a Commission policy.[7] The D.C. Circuit ruled that "...if the Commission is to have authority to command that common carriers not file tariffs, the authorization must come from Congress...."[8] Otherwise, "we are not at liberty to release the agency from the tie that binds it to the text Congress enacted."[9] Thus, without authority granted expressly by the new 1996 Act, the Commission has no authority in this proceeding to require mandatory forbearance at all.

Section 10, adopted as part of the 1996 Act, is entitled "Regulatory Forbearance." The new provision states that the Commission, after certain necessary conditions are met, "shall

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[5] See, e.g., AT&T Comments at 1-2; MCI Comments at 3-7; Frontier Comments at 1-2; TRA Comments at 2-5; Hyperion Comments at 2-5.

[6] 47 U.S.C. Section 203(a).

[7] See MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (Court strikes down FCC's Sixth Report and Order in the Competitive Carrier proceeding because the mandatory detariffing policy adopted by the FCC is contrary to the dictates of Section 203 of the Communications Act).

[8] Id. at 1195.

[9] Id. at 1194.

forbear from applying any regulation or any provision of this Act."[10] Section 10(a) goes on to specify that the Commission must determine that "enforcement of such regulation or provision is not necessary" and that "applying" such provision or regulation would not be in the public interest.[11] Section 10(b) discusses "forbearance from enforcing" a provision,[12] while Section 10(d) requires states not to "apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a)."[13] The Joint Conference Report also indicates that the Commission must "forbear from applying" any provision or regulation if it determines that "enforcement is not necessary...."[14]

WorldCom believes that the 1996 Act does not grant the FCC authority to adopt a mandatory detariffing policy. By prohibiting altogether the filing of tariffs, the Commission would be doing far more than simply not "applying" or "enforcing" the Section 203 tariff filing requirement, as the statute and the Conference Report repeatedly direct. Instead, the Commission would be eviscerating that provision of the 1934 Act completely, which the text of the 1996 Act does not do. What in essence the Commission is proposing in this proceeding is to forbid carriers from abiding by a statutory requirement. The 1996 Act never grants the FCC such broad, all-encompassing authority, and certainly does not appear to contemplate such a radical reading.

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[10] 47 U.S.C. Section 160(a).

[11] Id.

[12] 47 U.S.C. Section 160(b).

[13] 47 U.S.C. Section 160(d).

[14] Joint Conference Report, at 68.

Although the 1996 Act and the legislative history plainly allow the FCC only to refrain from "enforcing" or "applying" certain statutory provisions, this position is bolstered further by the accepted plain meaning of the word "forbearance." According to Webster's II New Riverside University Dictionary, to "forbear" is to "refrain from," to "desist from," or to "avoid" an action.[15] Further, the definition of "forbearance" includes a legal meaning of an "act of a creditor who refrains from enforcing a debt when it falls due."[16] Again, the operative definitional concept, as in the statute itself, is to refrain from applying or enforcing a previous requirement (i.e., permissive detariffing). This is obviously a far cry from compelling entities to not abide by a previous requirement (i.e., mandatory detariffing). The distinction between passively desisting and actively forbidding is clear, and unequivocal.

At least one federal appeals court appears to agree that the Commission lacks statutory authority to require mandatory detariffing. The D.C. Circuit recently imposed a stay pending appeal of the Commission's decision requiring that non-dominant interexchange carriers no longer file federal tariffs.[17] Although the Court's decision did not explain its rationale for imposing a stay, the Court did indicate that petitioners "have satisfied the stringent standards required for a stay pending court review."[18] One of the four prongs of that "stringent" test is

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[15] Webster's II New Riverside University Dictionary, Houghton Mifflin Co. (1988), at 496.

[16] Id.

[17] Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996).

[18] MCI Telecommunications Corp. v. FCC, No. 96-1459, Order, slip op. (D.C. Cir. Feb. 13, 1997) at 1.

a finding by the court of a "substantial likelihood of success on the merits."[19] The D.C. Circuit apparently holds the opinion that petitioners in the MCI appeal case likely will prevail on their efforts to overturn the Commission's mandatory detariffing policy.

Thus, the 1996 Act does not allow the Commission to adopt a mandatory detariffing policy. For the FCC to attempt to adopt such a policy for CLECs and CAPs in the face of clear statutory language would be, as the D.C. Circuit admonishes, to "release the agency from the tie that binds it to the text Congress enacted."[20]

B. Mandatory Detariffing Fails The Three-Part Statutory Test Because It Represents A Flawed Policy Choice That Would Not Be In The Public Interest

Even if the Commission finds that the 1996 Act somehow allows it to forbid carriers from abiding by a previous statutory requirement, the proposal to establish mandatory detariffing for CLECs and CAPs does not meet the three-part statutory test for forbearance. In particular, forbidding CLECs and CAPs from filing tariffs is not consistent with the public interest, as is required by the third prong of the statutory test.

WorldCom believes that the Commission has not offered any compelling reasons for adoption of mandatory detariffing for CLECs and CAPs. The FCC has a considerable burden under the 1996 Act to prove that its proposed policy meets all three criteria dictated by

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[19] See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 68-69 (1994).

[20] MCI v. FCC, 765 F.2d at 1194.

the statute, and otherwise would be in the public interest.[21] As commenters point out, the Commission's few stated reasons in the Notice for doing away with tariffs altogether do not withstand careful scrutiny.[22]

The Commission's first stated concern about a carrier's possible invocation of the so-called "filed rate doctrine" is misplaced.[23] WorldCom shares the Commission's view that carriers should not be allowed to unilaterally change rate or conditions in long-term service arrangements simply by filing an inconsistent tariff provision. However, the solution is not to prohibit the filing of tariffs altogether. Instead, the Commission can use its new forbearance authority to overturn the filed rate doctrine simply by making tariff filings optional. Once the mandatory nature of the tariff filing requirement is lifted, the filed rate doctrine is no longer applicable to carriers' tariff filings, and therefore has no legal foundation in the Communications Act. Alternatively, the Commission can require that carriers place statements in their permissive tariffs indicating that, where a contract and the tariff conflict, the contract's inconsistent provisions overrule the tariff, rather than the reverse.

Even if the Commission decides that the adoption of a permissive detariffing policy does not necessarily render the filed rate doctrine inapplicable, the Commission can take several steps to eliminate any concerns about consumers not receiving the "benefit of the bargain" they have negotiated with carriers. For example, the Commission can adopt certain procedural requirements that CLECs and CAPs must meet in order to make material changes

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[21] 47 U.S.C. Section 160(a).

[22] ALTS Comments at 1-2; GCI Comments at 1-4; RCN Comments at 4-6; TRA Comments at 6-9.

[23] Notice at para. 34.

to long-term service or contract tariffs, including a longer notice period and clear identification for such tariff filings. The "substantial cause" test also can be extended beyond the original customer to encompass subsequent customers who take service from the carrier. The important point is that any potentially negative effects of the filed rate doctrine can be successfully avoided without resorting to the extreme step of throwing out all tariff filings altogether.

The Commission's second stated concern about eliminating "any threat of price coordination through tariffing," and alleged collusive conduct by CLECs and CAPs, simply does not hold up.[24] Initially, the FCC offers no concrete evidence of the competitive harm of tariffs; even in the Notice, the Commission refers only to "any threat" of tacit price coordination.[25] More concrete evidence than that is required to support the Commission's accusation. Moreover, the remedy does not solve the alleged problem of price coordination because, even in the absence of tariffs, numerous other sources of public information about carrier rates do and can exist. Prohibiting tariffs may remove one potential source of pricing information, but many others will remain.

Finally, the Commission's concerns about the costs associated with tariff filings are misplaced.[26] Indeed, compelling carriers to abandon tariffs completely and resort to a contract regime for each and every customer will engender far more substantial costs to CLECs and CAPs than the current tariff filing regime. At a time when CLECs and CAPs are struggling to challenge incumbent monopolies, any unnecessary cost increases and upheavals should be

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[24] Notice at para. 34.

[25] Notice at para. 34.

[26] Notice at para. 34.

avoided. This is far from the mature market found in the long distance business. Adoption of a permissive detariffing policy, however, which allows CLECs and CAPs to refrain from filing tariffs, will significantly reduce the number of tariffs filed with the Commission, and the concomitant use of Commission resources. The important point is that it should be left up to individual consumers and carriers to decide when a contract best meets the consumer's needs, and when a tariffed arrangement is more appropriate and desirable. The most "pro-competitive, deregulatory regime" is one that gives the consumers maximum choices in the marketplace, not one which forecloses such choices altogether.

III. CONCLUSION

The Commission should heed the near-unanimous opposition registered by commenters, and decline to adopt its unsupported proposal to require CLECs and CAPs to refrain from filing federal tariffs.

Respectfully submitted,

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September 17, 1997

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I, Cecelia Y. Johnson, hereby certify that I have this 16th day of September, 1997, sent a copy of the foregoing "Reply Comments of WorldCom, Inc." by hand delivery or first class postage prepaid mail to the following

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